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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 299

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION

No. 300

UNITED STATES OF AMERICA, PETITIONER

v.

J. SHELDON POTTER

No. 301

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN ERRECA

No. 302

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES J. STEVINSON, A CORPORATION

No. 303

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIBALD J. STEVINSON

No. 304

UNITED STATES OF AMERICA, PETITIONER

v.

3-H SECURITIES COMPANY

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims overruling a demurrer in *Gerlach Live Stock Company* v. *United States* is reported in 102 C. Cls. 392. Its opinions after trial (R. 130–146, 191–192) are reported in 76 F. Supp. 87, 99.

JURISDICTION

The judgments of the Court of Claims in the Gerlach, J. Sheldon Potter, and Martin Erreca cases, Nos. 299, 300 and 301, were entered on April 5, 1948 (R. 146–147).[1] Motions for new trial were denied June 28, 1948 (R. 147). Judgments were entered in the James J. Stevinson (a Corporation), Archibald Stevinson and 3-H Securities Company cases, Nos. 302, 303 and

[1] These judgments were in substitution for judgments originally entered March 1, 1948, which were withdrawn (R. 70).

304, on March 1, 1948 (R. 192). Motions for new trial were denied June 1, 1948 (R. 192). On August 20, 1948, the time within which to file a petition for writs of certiorari in the Stevinson and 3–H Securities Company cases was extended by Mr. Justice Jackson to and including September 28, 1948 (R. 193). The petition for writs of certiorari was filed on September 24, 1948, and was granted on December 6, 1948. Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims was warranted in holding, contrary to an express congressional declaration, that the construction of the Friant Dam, which is an integral part of the Central Valley project in California, was not authorized for the purpose of aiding navigation and commerce.

2. Whether owners of land riparian to a navigable river have a property right in the flow of the river, particularly in flood waters and flood stages.

3. Whether respondents have a property right in the uncontrolled flooding of their lands in view of the provision of the California Constitution limiting rights in waters to reasonable beneficial use by reasonable methods of use and reasonable methods of diversion.

4. Whether respondents Gerlach Live Stock Company, J. Sheldon Potter and Martin Erreca

are barred from recovery because of the exceptions contained in the deeds through which they derive title to their lands.

5. Whether Congress has assumed an obligation, which would otherwise not exist, to pay respondents for damages to their lands caused by interference with the flow of the navigable stream.

6. Whether the judgments of the Court of Claims are deficient for failure of the court to make a finding describing the property which the court concluded was taken from respondents.

7. Whether the Court of Claims was correct in holding that there was a taking of respondents' property by October 20, 1941, and that just compensation must include interest from that date, even though at the time of trial nearly five years later, respondents had not been deprived of benefits from the flow of the river which they had formerly received and could not have been so deprived because various portions of the project had not been completed.

STATUTES INVOLVED

Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, provides:

> SEC. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions

of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided*

further, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and third, for power.

* * * * * * *

The relevant portion of the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, provides:

The second proviso in section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: "*Pro-*

vided further, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings, and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes."

Other statutes are set out in the Appendix, *infra,* pp. 81–96.

STATEMENT

These six cases were brought to recover just compensation for the alleged taking of property as a result of erection of the Friant Dam on the San Joaquin River, California. After a demurrer was overruled in *Gerlach Live Stock*

Company v. *United States*, 102 C. Cls. 392, all the cases were consolidated by order of the court and were tried together. Two sets of findings of fact and conclusions of law were made: one applicable to the *Gerlach, Potter* and *Erreca* cases, Nos. 299, 300 and 301, and another applicable to the two Stevinson and the *3–H Securities Company* cases, Nos. 302, 303 and 304.[2] The issues raised and the conclusions thereon were, however, all discussed in the opinion in the *Gerlach,* etc., cases which was adopted as the opinion in the *Stevinson,* etc., cases. The facts, as found by the Court of Claims, may be briefly summarized as follows:[3]

The Central Valley of California, some 450 miles long, lies between the Sierra Nevada Mountains on the east and a fringe of mountain chains on the west. The Sacramento River drains the northerly two-fifths of the valley and the San Joaquin River the southerly three-fifths. These rivers meet in a common delta and empty into Suisan Bay, an arm of San Francisco Bay (Fdg. 1, R. 71). Both the Sacramento and the

[2] A seventh case, *Martin Erreca, et al.*, No. 46247, was also considered in conjunction with the *Gerlach, Potter* and *Erreca* cases, but recovery therein was denied and that case is not now before this Court (see *Erreca* v. *United States*, certiorari denied, No. 238, this Term).

[3] Since there is little difference between the findings in the two groups of cases, generally references herein will be to the findings in the *Gerlach,* etc., cases, Nos. 299–301. The findings in the *Stevinson,* etc., cases, Nos. 302–304, will be referred to as "St. Fdgs. —."

San Joaquin are navigable rivers of the United States (Fdg. 49, R. 103). The present controversy relates to the ownership and the right to use waters of the San Joaquin. That river has its source in the Sierra Nevada Mountains and flows westerly to Friant, where it enters the valley (Fdg. 2, R. 71). From this point, where the Government's dam is situated, it continues west some 40 miles to Mendota, where it is joined by Fresno Slough of the Kings River (Fdg. 2, R. 71). At this point the river abruptly turns north and flows some 225 miles to the bay. Respondents' lands are situated in the valley north of Mendota, and between Friant and respondents' lands certain tributaries empty into the San Joaquin and contribute water in varying amounts to the river's flow (Fdg. 2, R. 71, St. Fdg. 4, R. 161).

In its course through the mountains and for some distance after it enters the valley, the river banks are so high as to preclude overflow. However, after the river reaches Gravelly Ford, some 27 miles west of Friant, the banks become relatively low and during periods of high or flood water the river flowed out of its banks, and at such times flowed through numerous side channels and sloughs (Fdg. 3, R. 71–72). In the vicinity of respondents' lands the flow of the river at lowest stages was confined by natural banks to a sandy channel (referred to in the findings as the "low channel") between lands which were granted to the State of California as swamp and

overflow lands under the Swamp Land Act of September 28, 1850, 9 Stat. 519. At higher stages the waters spread over such swamp lands to natural banks which had been surveyed shortly after 1850, this wider channel being referred to as the "high channel." The flow of the river has been variable in quantity both over the years and in periods within the years. However, in every year of ordinary flow the river overflows the high banks into the upland area for a few days in each of two annual periods from December to February and April to June (Fdg. 4, R. 72). The lands are moistened and enriched by such overflow (Fdgs. 3, 4, R. 71–72). Respondents own both land in the high channel and land outside the banks of the river (Fdgs. 6–8, R. 73–74). These are the lands involved in these cases.

Miller & Lux, Incorporated, and its subsidiaries, own large areas of land in the vicinity and formerly owned those of respondents Gerlach, Potter and Erreca. Upstream from respondents' lands it has diverted and appropriated large quantities of water to irrigate lands owned by it and by other persons, some of the lands being riparian to the river and others not (Fdgs. 10–11 R. 75–76). Also, dams and reservoirs had been installed by power companies above Friant Dam which materially altered the flow of the river (Fdgs. 14, 15, R. 77–78). There were other rights which were entitled to be satisfied out of the waters of the river before the lands of re-

spondents became entitled to the use of any water (Fdg. 21, R. 82–84), and an earthen dam, known as "Sack Dam," located at Temple Slough some 19 miles downstream from Mendota but upstream from respondents' lands, is annually rebuilt to irrigate land west of the river and is maintained until October, November or December (Fdg. 13, R. 76–77). While Sack Dam is in place "all the water remaining in the river at that point is diverted and plaintiffs do not receive and are not entitled to receive any material amount of water from the river" (Fdg. 13, R. 77). Hence, satisfaction of the various prior rights "require the entire supply of water in the river [at Temple Slough] at certain times of the year, and at all times of the year in some years of exceptionally low water" (Fdg. 12 R. 76). Other streams contribute water to the river between Temple Slough and respondents' lands (Fdgs. 2, 47, R. 71, 102).

The United States purchased certain rights from Miller & Lux, the agreement providing for an escrow fund to pay some judgments that might be recovered against the United States under certain conditions (Fdgs. 37, 38, R. 95–97). Respondents Gerlach Live Stock Company, Potter and Erreca claimed their lands through conveyances from Miller & Lux, subject in one case (Potter) to existing water rights of the company and to the right of the company to sell or convey any water right already established and to store

and/or change the place of use of such water, and, in the other cases (Gerlach and Erreca), subject to the water rights of the company to the end that the company may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River.[4] (Fdgs. 51, 59, 79, R. 106–107, 111–112, 125–126). The provisions of the escrow fund include the claims of respondents Gerlach and Potter and part of the claim of Martin Erreca, but not the claims of respondents James J. Stevinson, a corporation, Archibald Stevinson and 3–H Securities Company.

The Central Valley Project, whose principal features are the Shasta Dam on the Sacramento River, the Friant Dam on the San Joaquin River and a number of canals for the control and distribution of water, was first undertaken by the State of California. In H. Com. on Rivers and Harbors, Doc. No. 35, 73d Cong. 2d sess., the project was described, and the Chief of Engineers concluded that a federal contribution of $12,000,000 toward the construction of the Kennett (Shasta) Dam would be warranted. By the Act of August 30, 1935, 49 Stat. 1028, 1038, the work described in Doc. No. 35 was authorized. In December of that year the President approved a plan for the project as set forth in a letter of the Sec-

[4] These contractual provisions are discussed in the Argument, *infra*, p. 56.

retary of the Interior as a federal undertaking under the Emergency Relief Appropriation Act of 1935 (Fdg. 32, R. 90).

The plan in brief provided for the storage of the water of the Sacramento River by means of the Shasta Dam, and the release of that water for purposes of maintaining adequate navigation and irrigation in that river and in the delta region of the Sacramento and the San Joaquin. The amount of Sacramento water was sufficiently great to permit its use to supply the lower San Joaquin Valley, and the plan contemplated the pumping of Sacramento water 150 miles up the San Joaquin Valley as far as Mendota. This use of surplus Sacramento water permits storage of substantially all of the water of the San Joaquin in the Friant Reservoir, which is located at the point where the San Joaquin leaves the mountains and enters the valley. At Friant the water of the San Joaquin would be diverted northward and southward through the proposed Madera and Friant-Kern Canals to provide adequate water for the irrigation of developed lands in those areas. The Friant Reservoir will also prevent floods in the lower San Joaquin Valley; some water will be allowed to flow through the Friant dam for the purpose of reserving vacant storage space in the reservoir for flood control. (Fdgs. 32–36, R. 90–95). Other water enters the San Joaquin below the Friant Dam and above respondents' lands, but not in

sufficient amounts to flood the lands in question. (Fdg. 47, R. 102).

Both the Sacramento and the San Joaquin are navigable rivers, and it is unquestioned that the operation of the Shasta Dam will aid the navigation of the Sacramento. It is also undisputed that the lower San Joaquin from Stockton to Suisan Bay is navigable. The only other evidence as to navigability on the San Joaquin indicated that when the project came to full operation substantially all the flow of the river would be stopped at Temple Slough (Sack Dam) in most years (Fdg. 49, R. 103, Fdg. 13, R. 77). "No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods." (R. 104.)

The project was reauthorized by Congress in 1937 and 1940 and large sums ($113,750,000 up to 1941) have been appropriated for its construction (Fdg. 36, R. 95). Execution of the plan has proceeded with certain modifications, and in November 1939 construction was commenced on the Friant Dam, which will impound water of the

San Joaquin River (Fdgs. 36, 42, R. 95, 99). In October 1941 the dam was used to impound water by closing temporary outlets, the water level having been previously raised some 10 feet when the temporary openings were in use (Fdg. 43, R. 100). However, necessary valves were not installed until 1943, drum gates were not installed at the time of trial in 1946, and one of the diversion canals was not completed at that time (Fdgs. 44–46, R. 100–102). Thus, up to the time of the trial respondents were still receiving "all the water they ever got" (R. 141).

In addition to the facts outlined above, the court below found that respondents' lands are only benefited during a relatively short period at the peak of the spring floods which flow over the lands and moisten and enrich them, the larger part of the flow eventually discharging into Suisan Bay (Fdg. 28, R. 87–88; Fdgs. 56, 85–86, R. 110, 127–128; St. Fdgs. 41, 45, 48, R. 188, 189, 190). The court further found that "Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941", but that when the Friant-Kern canal is completed the planned operation of the dam and the canals will prevent the further overflowing of respondents' lands by spring floods (Fdgs. 56, 85, R. 110, 127; St. Fdgs. 41, 45, 48, R. 188, 189, 190), and that except in years of extremely high water the combined flows of spills from Friant Dam, and from other streams, would not flood respondents' lands (Fdg.

47, R. 102; St. Fdg. 37, R. 183–184). In the case of Martin Erreca, No. 301, the tract had been protected by dikes and benefited from subirrigation by seepage and by periodic pumping from a pool on the main channel. The court found that operation of Friant Dam and the canals "will completely stop pumping from the spring high waters, except in years of unusually high flow, and will deprive the tract of all benefit from subirrigation" (Fdg. 62, R. 113). In each case the court determined the difference between the fair market value of the lands "with riparian rights to the use of the water of the San Joaquin River, and the fair market value without such riparian rights" (Fdgs. 57, 63, 87, R. 110, 113, 128; St. Fdgs. 42, 46, 49, R. 188, 190, 190–191).

Upon these findings, judgments were entered for the respondents. The opinion of the court concluded first that the Friant Dam was erected for the "sole and only purpose of irrigating arid and semiarid lands, and perhaps also flood control" (R. 130), and that the purpose of this flood control "was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands" (R. 131).[5] Next, it con-

[5] In the *Gerlach* case the Government had demurred to the petition on the ground that, since Congress had declared that the Central Valley project was for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof and

cluded that respondents were entitled to compensation for the loss of benefits from flood waters (R. 133). The court then concluded that respondents Gerlach Live Stock Company, Erreca and Potter were not barred from recovery because of the exceptions in their deeds (R. 135–138), nor were respondents' rights to recovery affected by Article XIV, sec. 3, of the California Constitution (R. 138–141). It further held that there had been a taking by October 20, 1941 (R. 141–145), and interest from that date was added to the amount awarded each respondent.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In holding that there had been a taking of property of respondents.

2. In failing to give effect to the declaration and directions of Congress as to the purposes of the Central Valley project.

3. In holding that the Friant Dam was erected solely for the purpose of irrigating arid and semi-arid lands.

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other purposes and had directed that "the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control," the prevention of the flooding of respondents' land did not constitute a taking. The court overruled this demurrer on the ground that there was nothing to negative plaintiffs' allegation that the purpose of the construction of Friant Dam was solely to irrigate certain non-riparian lands. *Gerlach Live Stock Company* v. *United States*, 102 C. Cls. 392.

4. In holding that respondents had property rights in the flow of a navigable river as against the United States.

5. In failing to define what property interests were taken.

6. In holding that there had been a taking on October 20, 1941, and in including interest from that date as a part of just compensation.

7. In holding that respondents Gerlach Live Stock Company, J. Sheldon Potter and Martin Erreca were not barred from recovery by the reservation of water rights by their predecessor in title.

8. In holding that respondents' rights to recover were not affected by Article XIV, sec. 3, of the Constitution of the State of California.

9. In entering judgments against the United States.

SUMMARY OF ARGUMENT

I

A. In authorizing the Central Valley project, Congress declared that it is for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods and other purposes; and directed that the dams and reservoirs be operated first for river regulation, improvement of navigation and flood control.

The Court of Claims held the congressional declaration invalid as to the Friant Dam, on the

ground that this portion of the project did not aid navigation but rendered the upper reaches of the San Joaquin less navigable than before. But it is well settled by decisions of this Court that improvement of navigability is only a part of the commerce control over navigable streams which also includes flood protection, watershed development and recovery of cost of improvements through utilization of power. *United States* v. *Appalachian Power Co.*, 311 U. S. 377. Here the Friant Dam will be operated in the interests of flood control and irrigation, and not, as the opinion states, solely for purposes of irrigation.

Moreover, the Friant Dam is only one portion of the Central Valley Project. The acts of Congress relating to the Central Valley Project and the reports submitted to it show that Congress treated the entire undertaking as an entity with the purpose of exercising its authority over navigable streams, and that each element, *including* Friant Dam, was authorized in the exercise of that authority. The Court of Claims was not warranted in isolating Friant Dam from the comprehensive project of which it is a part. There is no constitutional justification for viewing each structure separate from the unified program for the connected body of waters. *United States* v. *Commodore Park*, 324 U. S. 386, is decisive as to this, since it shows that a project must be treated as an integral whole even though it involves two bodies of navigable water the navigability of one

of which was destroyed, and where the impairment of riparian property values resulted directly from that portion of the plan which rendered one body of water non-navigable.

B. Repeated decisions of this Court have established that "the flow of a navigable stream is in no sense private property," and that riparian owners do not have a vested right thereto, in the development of power therefrom, or in securing economic benefit from their proximity to the river in other ways so that they may demand compensation when the flow is altered by the United States. *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Commodore Park*, 324 U. S. 386; *United States* v. *Willow River Co.*, 324 U. S. 499. The result is no different when, as here, the economic benefit enjoyed by a riparian owner is a "water right" to irrigate lands in an arid state. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.

II

Respondents had no property rights to uncontrolled flooding of their lands under California law. As a result of a decision holding that a riparian owner had a vested right in the natural flow of a stream, including annually recurring floods, California amended its Constitution so as to deny a right to "waste or unreasonable use or unreasonable method of use of water." In the

instant case respondents benefit only from the peak of spring floods, the larger part of which flows down the valley and is not used for irrigation. This is an unreasonable use and method of use of the water. Under the California Constitution respondents have no property rights in water which can benefit their lands only by wasting a major portion of the flow.

III

Respondents Gerlach, Potter and Erreca were barred from recovery by reservations in the deeds under which they held title. These deeds reserved to the grantor the right to permit storage on the upper reaches of the river. The United States has succeeded to the rights so reserved. It is clear from the findings in this case that it is the storage, not the diversion of water (as stated by the court below) upon which the judgments are based. The construction given to the reservation in the third instance (J. Sheldon Potter) renders it nugatory.

IV

Respondents seek to support the judgments on the ground that Congress has assumed liability to them. But there is no such assumption of liability.

A. The legislation relating to the Central Valley project simply referred to the purchase of water rights or of water used for the irrigation of pasture lands, and appropriated funds which

might be used for that purpose amongst others. These authorizations fall far short of a direction that compensation shall be paid to respondents or others similarly situated, such as is necessary to establish a statutory right to compensation. *Mitchell* v. *United States*, 267 U. S. 341.

B. The Reclamation Act of 1902 has been made applicable to the Central Valley Project. But that Act simply recognized rights existing under local law, and did not grant private rights in the flow of navigable streams as against the United States. Almost contemporaneously with the passage of the Act, it was construed as not creating property rights in the flow of navigable streams, and this interpretation has been accepted for over forty years.

C. Section 1 (b) of the Flood Control Act of 194[illegible] merely states a general policy for the future as to the considerations which should be given the interests of the Western States in irrigation in planning projects in those areas. It says nothing as to the rights of riparian owners, and grants no new rights of compensation.

V

The Court of Claims was under a duty to make findings containing an "accurate description of the property taken." *United States* v. *Causby*, 328 U. S. 256, 267. No such finding was made here. It is especially important here that the "water rights" which may have been taken be described

with precision so as to avoid any controversy in the future.

VI

Interest was awarded from October 20, 1941, on the ground that the property had been taken at that time. Although on that date some water was impounded in the dam, it was not then placed in complete operation and could not have been because the diversion canals were not completed and controls were not then installed. The result was that respondents were not then deprived of any benefits to which they were entitled, and this condition still prevailed at the time of trial in 1946. Under these facts, there was not a taking of property from respondents in 1941 which would require an award of interest from that date but simply a prospect that sometime in the future there would be a taking. *Danforth* v. *United States*, 308 U. S. 271. To award interest for a period during which respondents enjoyed all their former rights is not required by the Fifth Amendment.

ARGUMENT

I

THE FRIANT DAM WAS ERECTED IN EXERCISE OF THE AUTHORITY OF THE UNITED STATES OVER NAVIGABLE STREAMS, AND RESPONDENTS HAVE NO PROPERTY RIGHTS AGAINST THE UNITED STATES IN THE FLOW OF SUCH STREAMS

The court below rejected the contention of the United States that the Friant Dam was erected

in the exercise of the federal authority over navigable streams and that respondents had no property rights in the flow of the stream nor in the flood stages thereof. We shall show that the Friant Dam was properly authorized in exercise of the federal power over navigation and commerce, and that respondents had no property rights in the flow or flood stages of the San Joaquin River as against the United States.

A. THE FRIANT DAM WAS ERECTED IN EXERCISE OF THE AUTHORITY OF THE UNITED STATES OVER NAVIGABLE STREAMS

In the Rivers and Harbors Act of August 26, 1937, sec. 2, 50 Stat. 844, 850, and again in the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, Congress provided that "the entire Central Valley project * * * is * * * declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof * * *." The 1937 Act further provided "That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control." The Court of Claims was not, we submit, authorized to reject this congressional determination.

In *Arizona* v. *California*, 283 U. S. 423, it was stated with reference to a similar statute (pp.

456–457), "This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose." Again, in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, this Court said (p. 527): "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character."

Although the congressional declarations related to the entire Central Valley Project, the Court of Claims has held it valid only as to the Shasta Dam, which the court characterized as "the only part of the entire project that could be said to have been in aid of navigation" (R. 131). The position of the court seems to be that the federal power to improve navigation and commerce can only be exercised by increasing facilities for the operation of boats in the vicinity of the dam. The court stated in its opinion (R. 130–131) that "Instead of improving navigation on the San Joaquin River the erection of this [Friant] dam destroyed any possibility of navigation on the upper reaches of the river"; and that "The effect of the erection of this dam was to make the San Joaquin River throughout its course less navigable than it had been before, and for many miles

on the upper reaches of the river it converted it into a dry river bed."

We submit that the decision below is demonstrably erroneous for several reasons. In the first place Congress established the Central Valley Project as an integral whole and concluded that the purpose of the entire Project was to improve navigation. Without denying this, the Court of Claims held that if a portion of the Project did not directly benefit navigation, the purpose and effect of the Project as a whole was irrelevant insofar as that portion of the Project was concerned. We think the Court of Claims should not have segregated what Congress quite properly treated as a unit.

In the second place, the court's own findings show that the Friant Dam was designed to prevent floods in the San Joaquin Valley, and that it would be operated for that purpose as well as for the storage of water for irrigation. This Court has indicated that flood control is an appropriate basis for federal regulation of navigable streams. Floods impair navigability and commerce in many ways. If we assume that there would be commercial navigation of only the lower reaches of the San Joaquin, nevertheless prevention of floods in the upper river could reasonably be thought to be an aid to commerce. *Oklahoma v. Atkinson Co.*, 313 U. S. 508.

1. The Central Valley Project should be viewed as a whole

In overruling the Government's demurrer, that court reasoned that, while Congress had declared that the entire Central Valley project was for the purpose of improving navigation, among other things, "we do not understand Congress to have meant the entire project and each integral part thereof." *Gerlach Live Stock Company* v. *United States,* 102 C. Cls. 392, 398. The court concluded that, looking at the Friant Dam alone, it is impossible to say that the dam was intended to improve navigation and "we do not think Congress meant to say it was." 102 C. Cls. 399. This was said despite the direction in the statute "That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; * * *." The same approach was taken upon the final decision (R. 130–131). Thus, in determining the scope of the constitutional power the court confined its consideration to the particular structure involved, ignoring the fact that it constituted simply one element of a comprehensive plan.

The scope of the federal power is not to be tested by reference to the effect of the dam upon one reach of the river adjoining the dam. Indeed, Congress may destroy navigation in one part of a river to improve or preserve navigation and commerce elsewhere (*United States* v. *Com-*

modore Park, 324 U. S. 386; *South Carolina* v. *Georgia*, 93 U. S. 4),-and may permit what would otherwise be an obstruction to navigation, e. g., a bridge, in order to serve other means of commerce (*Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421).

The *Commodore Park* case also involved two bodies of navigable waters, although on a smaller scale. In that case, as is claimed to be true here, the navigability of one was destroyed. This Court nevertheless held that the project was to be regarded as a whole, saying (pp. 392–393):

> While this project touched two separate, although closely related, bodies of navigable waters, and looked to improvement of shore as well as water facilities, the entire program as to the waters was designed to achieve one closely integrated unit. That there were two bodies of navigable waters to which the one program related, does not detract from Congressional power as to either, for its powers are broad enough to justify one unified program for the connected body of waters to the end that commerce in general may be fostered.
>
> Thus, having power under the Commerce Clause to obstruct navigation by depositing the dredged soil in Willoughby Bay, the government was likewise authorized to deposit in Mason Creek for the same purpose. There is power to block navigation at one place to foster it at another. Whether

> this blocking be done by altering the stream's course, by lighthouses, jetties, piers, or a dam made of dredged material, the government's power is the same and in the instant case is derived from the same source—its authority to regulate commerce.

It was also contended in the *Commodore Park* case that the deposit of the dredged materials in the navigable creek was for the purpose of improving shore facilities at the Naval Base, not navigation, just as it is here argued that the purpose of the part of the Central Valley Project which impaired the value of respondent's lands was irrigation and not to aid navigation. But this Court held that (pp. 391–392):

> The "fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power." *Arizona* v. *California,* 283 U. S. 423, 456.

The holding in the *Commodore Park* case was that the owner of riparian property was not entitled to compensation because of the impairment of the value of his property resulting from the destruction of the navigability of the immediately adjacent waters as a part of a project one of whose objects was to improve navigation elsewhere. This decision shows both that a project must be treated as an integral whole and that it

is immaterial that impairment of riparian property values results directly from a portion of the plan which may not of itself aid navigation.

Similarly, in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, this Court emphasized the fact that the particular dam involved was part of a comprehensive flood-control program for the Mississippi, stating (p. 525), "Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river."

So here, the Friant Dam was not an isolated structure, but was an integral part of the entire Central Valley Project. It is clear that Congress treated the Project as a whole, that the primary purpose of Congress in authorizing the Project was to exercise its authority over navigation and commerce, and, hence, that Friant Dam may not be excluded from the congressional declarations as to the purposes of the Project and its directions as to its operation.

The Central Valley Project was first undertaken by the State of California in 1933. The State statute declared that it was a single project and, as to Friant Dam specifically, that it was for "improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River" and other purposes. Cal. Water Code, secs. 11,200, 11,226. In 1933, the Chief of Engineers submitted to Congress a report

on the Sacramento and San Joaquin Rivers (H. Doc. No. 191, 73d Cong. 2d sess.) in which he stated (pp. 4–5), "The comprehensive State plan for the conservation of water resources in the Central Valley affords, in my opinion, the best general plan for the improvement of the Sacramento and San Joaquin Rivers for navigation and for the prosecution of this work in combination with the development of water power, the control of floods, and the needs of irrigation." And in 1934, the problems of the Sacramento and San Joaquin River valleys were discussed at length in connection with a comprehensive report upon rivers throughout the country. H. Doc. No. 395, 73d Cong. 2d sess. pp. 322–332, 379–380. Both reports emphasized the comprehensive nature of the Central Valley Project for the integrated development of the Sacramento and San Joaquin River systems to serve all interests. In April 1935, the Senate and Assembly of California memorialized Congress to make federal funds available for the project. In H. Com. on Rivers and Harbors, Doc. No. 35, 73d Cong. 2d sess., the project was described, and the Chief of Engineers concluded that federal participation to the extent of $12,000,000 towards construction by the State of California of the Kennett (Shasta) Dam, one part of the Central Valley Project, would be warranted. By the Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, the work described in Doc. No.

35 was authorized. See H. Rep. No. 424, 74th Cong. 1st sess. pp. 53–54. Cf. *United States* v. *Miller*, 317 U. S. 369, 370–371.

In December 1935, upon the recommendation of the Secretary of the Interior, the Central Valley Project was approved by the President as a federal undertaking (Fdg. 33, R. 91–93). Thereafter, in the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, and the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, the "entire Central Valley project" was reauthorized by Congress in the combined interests of navigation and flood control, power production and irrigation. An essential feature of the project from the beginning has been the transfer of excess water from the Sacramento River to the San Joaquin basin, permitting better use of waters, especially flood waters, in the San Joaquin Valley. It is this transfer of waters which will permit the storage of water at Friant so as to avoid floods in the Valley and allow diversion of the water for irrigation.[6] The transferred

[6] The method of transfer of these waters has been altered in that rather than using dams and pumping plants in the San Joaquin River, the transfer will be accomplished by gravity flow in the Delta-Mendota Canal (Fdgs. 33, 34, R. 91–94). This modification does not change the essential purpose of the project, nor does it alter the fact that the exchange of water from the Sacramento to the San Joaquin River is a basic element of the comprehensive plan. See S. Doc. No. 142, 79th Cong., 2d sess., pp. 23, 44; H. Doc. No. 649, 78th Cong., 2d sess., pp. 28, 47. The court's findings demonstrate the error of the statement of the court in its ruling upon de-

water provides for the needs of most of the San Joaquin Valley, and this in turn permits the impounding at Friant which protects the Valley against floods.

This history demonstrates that the project has been treated throughout as a single comprehensive development and that Congress spoke advisedly when it declared that the "entire Central Valley Project" was for the purpose of improving navigation and commerce, for reclamation of arid lands and for power production. As the general report on rivers throughout the United States submitted to Congress in 1934 stated (H. Doc. No. 395, 73d Cong., 2d sess., p. 328):

> The comprehensive plan for the further development of the water resources of the Central Valley includes the construction of a series of foothill reservoirs for the regulation of stream flow in the combined interests of irrigation, salinity control, flood control, power development, and navigation; the construction of canals and conduits for the transportation of water to points of use; the installation of power facilities at the foothill reservoirs; and the improvement of the Sacramento and San Joaquin Rivers for navigation.

Thus, the Central Valley Project is an outstanding example of the integration of various dams, reservoirs, etc., in the combined interests of all

murrer that the portion of the project providing for transfer of water from the Sacramento to the San Joaquin Valley had been abandoned (102 C. Cls. at p. 397).

concerned. And Congress has stated that the first purpose for which the entire project was undertaken and for which it will be operated is the promotion of navigation and commerce. Congress was amply justified in so treating the project as an entity, and hence, the court below was not warranted in isolating Friant Dam from the entire project. Similarly, this Court in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, with reference to 157 reservoir projects throughout the tributaries of the Mississippi, said (pp. 527–528):

> To say that no one of those projects could be constitutionally authorized because its separate effect on floods in the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole. That reveals the necessity, from the constitutional viewpoint, of leaving to Congress the decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods.

Moreover, in the instant case, Congress, in addition to declaring that the entire Central Valley Project was for the purposes of navigation and commerce and other purposes, directed "That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation and flood control". Act of August 26, 1937, 50 Stat. 844, 850. Respondents at least had the burden of showing that it is impossible to use Friant Dam for

such purposes. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *Arizona* v. *California*, 283 U. S. 423, 455–456. There is neither finding nor evidence that such is the case.

2. The prevention of floods by the Friant Dam must be assumed to be an aid to commerce in the absence of any showing to the contrary

The court below declared in its opinion (R. 131) that the purpose of the Friant Dam was "irrigation" and not an "aid of navigation." The opinion recognized that a purpose was "flood control", but stated that the sole purpose of this was to use the water to irrigate arid lands (R. 131). The latter statement, however, is inconsistent with the findings that under the plan there would be "occasional spills to provide reserve storage capacity for the purpose of flood control" (Fdg. 32, R. 90), and that "Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, *but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control*" (Fdg. 35, R. 94). [Italics supplied.] Since the findings control contradictory statements in the opinion (*United States* v. *Shoshone Tribe*, 304 U. S. 111, 115), this itself demonstrates that, as Congress directed, the Friant Dam will be operated for "flood control."

The fact that for flood control purposes water will be released into the river to give storage space for flood waters necessarily means that such released waters will not be diverted for use on lands

supplied by Friant Dam. Hence, to that extent, the dam is less useful for irrigation purposes than it would be if the maximum amount of water were stored without regard to the effects of floods. Thus, operation of the dam for flood control is at the expense of possible irrigation uses, not solely for irrigation as the court below declared. And the prevention of floods, is obviously an aid to commerce. See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, in which this Court noted that among the costs of Mississippi floods were the "interruption of navigation, injury of port facilities, the creation of sand bars in the channels, interruption or stoppage of interstate transportation by rail, truck and motorcar" (p. 520), and that "it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself" (p. 525). As this Court stated in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426:

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.

In 1932, the Division Engineer pointed out that the San Joaquin "has been subject to destructive floods in the lower stretches." H. Doc. No. 191, 73d Cong., 2d sess., p. 16.[1] And, because of the contribution of Friant Dam to flood control, the district engineer and the Board of Engineers for Rivers and Harbors in 1940 stated that part of the cost of construction of Friant Dam might be charged to flood control. H. Com. on Flood Control Doc. No. 2, 78th Cong., 2d sess. The report in 1940 pointed out that in addition to other damage, the floods had caused damage to highways and interrupted the service of railroads and telephones, which are, of course, the primary means of interstate commerce. And the Secretary of the Interior has recommended that a portion of the cost of Friant Dam be allocated to flood control on the basis of an annual benefit of $291,500 from use for this purpose. H. Doc. No. 14[illegible], 80th Cong., 1st sess., pp. 29, 35. Moreover, "the fact that ends other than flood control will also be served, or that flood control may be

[1] The "Friant Reservoir" referred to in H. Doc. No. 791, 71st Cong., 3d sess., from which excerpts are quoted by respondents (Br. in Opp. pp. 5–6) is not the present Friant Dam at all. That report related to an entirely different type of project which it was proposed should be constructed for purposes of power development and irrigation at the Friant site. H. Doc. No. 791, p. 10. The Friant Dam in fact constructed is much larger than that proposed in the report and is not designed or used for power production, but for irrigation and flood control.

relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress." *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534; *Arizona* v. *California*, 283 U. S. 423, 456.

The findings here state specifically that there is no evidence one way or the other as to the effect of the Friant Dam upon the navigability of the lower portions of the river or upon such matters as the deposit of silt or the alteration of currents downstream, or as to the effect of floods upon interstate railways and highway traffic (Fdg. 49, R. 103–4; St. Fdg. 39, R. 185). In the absence of evidence the court below should not have assumed the non-existence of facts which would support the congressional declaration, particularly when the beneficial effects upon commerce of flood control projects on the upper reaches of a river are commonly known. Respondents did not prove that the Friant Dam, concededly designed both for flood control and irrigation purposes, was not an aid to commerce by establishing that it dried up portions of the river far upstream. And the burden of proof was clearly upon respondents, particularly when they were seeking to overturn a congressional declaration.

Respondents assert (Br. in Opp. p. 4) that in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81 (1927), certiorari dismissed for want of federal question, 275 U. S. 486, and *United States* v. *Central Stockholders' Corporation*, 52 F. 2d 322 (C. A. 9), it was held that storage on

the San Joaquin River was not in aid of navigation. These decisions did not, of course relate to the Central Valley Project or to the Friant Dam, and, in fact, they were expressly based on the view that the authority of the federal government over navigable streams was not involved. See 52 F. 2d at pp. 332–333, 339.

B. OWNERS OF LAND RIPARIAN TO A NAVIGABLE RIVER DO NOT OWN THE FLOWING WATERS AS AGAINST THE UNITED STATES

Respondents here do not complain that a Government project is flooding their lands. On the contrary, they are asserting that they have property rights in the flow of the stream, particularly flood waters. While the court made no finding describing the property interest it held to have been taken, the opinion stated (R. 133) "there was left in times of high water sufficient additional water to overflow the lands of the plaintiffs or, by seepage, to raise the water level underneath their lands. The result was that by overflows and by seepage the lands of the plaintiffs were moistened and enriched and made more productive. The erection of the Friant Dam took these rights from plaintiffs." Thus, the holding of the court below is that respondents have a property right to use the flow, and a similar property right in the flood stages, of a navigable stream.

Respondents concede that the rights they claim are subordinate to other riparian rights as well

as to appropriative and prescriptive rights. Such prior rights took all the water of the river for substantial periods of the year and for all of the year in some years. The result is that, as the court found, respondents benefit only from a limited amount of flood waters in the spring during the period of heavy flooding (Fdg. 29, R. 88; Fdgs. 56, 62, 85, R. 110, 113, 127; St. Fdgs. 41, 45, 48, R. 188, 189, 190). One of the principal causes of the decrease in navigation on the river has been the increasing amount of diversion of water from the San Joaquin River for the irrigation of farm lands. See H. Doc. No. 395, 73d Cong. 2d sess. And, of course, the floods cause damage of themselves. See p. 37, *supra*. Respondents claim a right to use all of the water remaining in the river after prior rights have been satisfied (R. 2–3, 19–20, 46–47, 150–151, 155–156; 158–159). The consequence is that respondents' claim to waters means that they insist on a property right to impair the navigability of the river and to prevent the control of floods therein. We submit that no such property right exists.

This Court has held that there are no private property rights in the waters of a navigable river of the United States. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, stated: "The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use.

The flow of a navigable stream is in no sense private property; 'that running water in a great navigable stream is capable of private ownership is inconceivable'. [Quoted from *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69.] Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion." More recently, this principle was applied in *United States* v. *Commodore Park*, 324 U. S. 386, and *United States* v. *Willow River Co.*, 324 U. S. 499. In holding, in the *Commodore Park* case, that no compensation was owing for the destruction of access of the riparian owner to navigable waters, this Court said (pp. 390–391):

> Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream. Respondent's property was always subject to a dominant servitude; it did not have a vested right to have this navigable stream remain fixed and unaltered simply because of the consequent reflected additional market value to adjacent lands. Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's "absolute" power, in the interests of commerce; to make necessary changes in a stream. In short, as against the de-

> mands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as "fishing and boating and the like," for which rights the government must pay. Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold.

And in the *Willow River* case the principles were summarized as follows (p. 510):

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.
>
> Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property.

Thus, a person who owns land riparian to a navigable stream does not have a property right in the waters and hence has no right to complain when the flow thereof is changed by the United States. This is so whether the land is benefited because in its natural state the fall of the stream creates water power (*Chandler-Dunbar Co., Appalachian Power Co., Willow River Co.* cases, *supra*), or because the stream provides access to the riparian lands (*Commodore Park* case, *supra; Gibson* v. *United States,* 166 U. S. 269).

The existence of a property right in the waters of a navigable stream is not dependent upon whether the United States is changing the flow of the river in aid of navigation or for some other purpose. Such was the holding of the *Appalachian* case. There the company contended that the recapture clause of the license to be issued under the Federal Power Act was unconnected with navigation and would constitute a taking of property without payment of just compensation. The company had as complete right to use the waters of the river as could be obtained under state law. This Court's opinion recognized that (311 U. S., at 424) "It is quite true that the criticised provisions summarized above are not essential to or even concerned with navigation as such." The Court nevertheless held that the Company would not be entitled to compensation for its water power rights because it had "no private property in the flow of the stream", saying (311 U. S., at 427):

> The respondent urges that as riparian owner with state approval of its plans, it is entitled to freedom in the development of its property and particularly cannot be compelled to submit to the acquisition clause with a price fixed at less than a fair value, in the eminent domain sense, at the time of taking. Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown, note 77, *supra*, that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power.

So in the instant case, respondents do not have a vested right to use the waters of the river simply because their lands are benefited thereby. And certainly, there is no property right to have this navigable stream continue to overflow during the spring flood season. Such a "right" to probably the most harmful use of a stream from the standpoint of the public as a whole would be entitled to even less protection than the "rights" involved in the cases cited.

No distinction can be made based upon the view that "water rights" in western states are involved; that is, rights to use the waters for agricultural production by means of irrigation

systems, or, as here, simply by flooding of the lands. The principle is the same whether the economic advantage arises from water power development, from promotion of agriculture by furnishing access to markets, or from the furnishing of moisture to adjoining land. And the principle is the same whether riparian rights in the eastern states are involved or rights in western states—whether under the doctrine of appropriation or, as here, under the doctrine of riparian rights.

The absence of any distinction was made clear in *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690. One aspect of the federal control over navigable streams is the fact that obstructions to commerce may be prohibited. This power was exercised by Congress in the River and Harbor Act of 1890, 26 Stat. 426, 454, prohibiting obstructions to the navigable capacity of waters of the United States.[6] This Court in the *Rio Grande* case held that diversion of waters for irrigation purposes might be enjoined under that Act. The opinion summarized the change made in some western states from the doctrine of riparian rights to the appropriation doctrine, pointed to certain acts of Congress, and stated (p. 706):

[6] A similar but broader prohibition was contained in the River and Harbor Act of 1899, 30 Stat. 1121, 1151, 33 U. S. C. 403.

Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests

> of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress.

The Court concluded that the Act prohibiting obstructions to navigable capacity applied to the Rio Grande. Thus, this Court long ago recognized that persons in the West desiring to use water for irrigation have no greater rights in navigable streams of the West than those who desire to use the navigable waters for various other purposes where water is more plentiful. In *California Oregon Power Co.* v. *Cement Co.*, 295 U. S. 142, this Court, in discussing the provision of the Desert Land Act of March 3, 1877, 19 Stat. 377, relating to the privilege of acquiring rights under state law to use waters flowing through the public domain, carefully limited the conclusion there reached to non-navigable streams (pp. 156, 159, 162, 163).

It is established that respondents had no property right to use the waters of the river for the development of power. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Continental Land Co.* v. *United States*, 88 F. 2d 104 (C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*,

135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747. No reason can be given why they have greater rights to use the waters for irrigation purposes.

II

RESPONDENTS HAD NO PROPERTY RIGHTS TO UNCONTROLLED FLOODING OF THEIR LANDS UNDER CALIFORNIA LAW

In Point I we have argued that respondents are not entitled to recover because they have no right under federal law in the flow of a navigable stream. In this Point we shall show that respondents have no property rights under California law to the uncontrolled flooding of their lands. Their claims would, therefore, have no merit even if the Court should not accept the argument advanced in Point I.

As we have shown, *supra*, pp. 15–16, respondents' recovery is based solely on the benefits they derive from the peak of the flood waters of the river. Prior to 1926, it was not clear whether a riparian landowner in California could complain of the detriment resulting from reduction of floods. In that year the Supreme Court of California held in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, certiorari dismissed, 275 U. S. 486, that the owners of riparian lands were entitled to have streams flow in their natural state, including annually recurring overflow, and that one who reduced the flood levels so that they no longer

spread over riparian lands became liable to the owner of those lands. However, in the following year an amendment to the California Constitution was proposed, the purpose being "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea." *Gin S. Chow* v. *City of Santa Barbara,* 217 Cal. 673, 700. The amendment, adopted in 1928, declared the purpose of preventing "the waste or unreasonable use or unreasonable method of use of water," and provided that the right to water shall be limited "to such water as shall be reasonably required for the beneficial use to be served", and that "such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; * * *". Cal. Const., Art. XIV, sec. 3, quoted in Fdg. 48, R. 102–3.

The court below found as a fact that the controlled use of the water for cropland was a more reasonable and beneficial use than the flooding of uncontrolled grassland, whereby some of the water is absorbed and the remainder flows on (Fdg. 48, R. 103). The finding states:

The operation of the government's plan by means of control through Friant Dam and the Madera and Friant-Kern Canals, will conserve water of the river and will increase the acreage of crop land under irrigation. Water previously used for controlled grassland will be available for crop land. The equivalent of approximately one acre-foot per acre per flood absorbed by the 82,000 acres of uncontrolled grassland will be available for crop lands and can be used, except for occasional spills, in seasons of low water supply. The portion of the flood waters which is not absorbed and which flows unchecked into Suisan Bay can be stored and used on crop lands.

There is some riparian use of the flood water downstream from the flood plain here involved, but the extent is not shown. The flood waters also help to repel the encroachment of salt water in the Delta area. There is no evidence from which the relative economic value of the control of the river under the government's plan can be approximately compared with that which would exist without such control. However, it is reasonable to infer from the evidence that the conservation and use of the water under the government's plan, while depriving riparian uncontrolled grasslands of flood water heretofore customarily utilized by them, will be a more reasonable and beneficial use in the interest of the people and for the public welfare.

The court below held, however, that the constitutional amendment did not prevent respondents' recovery, stating (R. 140):

> It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use.

This construction of the California law largely prevents it from achieving its objective. It is obvious that there is no physical process by which respondents could have been assured that the peak of spring floods would moisten their lands and at the same time the waste of such waters prevented. The court found (Fdg. 31, R. 90), "Because of the time required for grassland to utilize 3 acre-feet of water per acre, and because of the relatively short time during which there is a surplus of water above the requirements of appropriative and prescriptive rights, and because of the topographical situation of the lands, controlled diversion is not feasible." It is thus obvious that the flood waters are largely wasted. It is

clear that such waste in order to spread the smaller part of the flow over respondents' lands is not either a "reasonable method of use" or a "reasonable method of diversion."

In *Peabody* v. *City of Vallejo,* 2 Cal. 2d 351, the plaintiffs Peabody and others claimed benefit from storm waters overflowing their lands and depositing silt thereon, washing salt out of the lands and saturating the lands. The trial court found that these waters were being put to beneficial use by the plaintiffs, and enjoined the defendant from storing any waters in the stream. The Supreme Court of California reversed because of the effects of the constitutional amendment. After discussing the amendment, the Court held (p. 369):

> The asserted right of a riparian owner, whose lands in a state of nature form a delta at about sea level, to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon, or by artificial check dams and levees to remove the saline content of the soil which in a state of nature are salt marsh lands, cannot be supported. So far as we are advised, this asserted right does not inhere in the riparian right at common law, and as a natural right cannot be asserted as against the police power of the state in the conservation of its waters. This asserted right involves an unreasonable use or an unreasonable method of use or an

unreasonable method of diversion of water as contemplated by the Constitution. This conclusion applies to much of the lands owned by the plaintiff Peabody.

The same conclusion applies also to the asserted right of other plaintiffs to have the flood and freshet waters which leave the natural channel of the stream, overflow their lands and never return to the channel. (See *Montecito Valley Water Co.* v. *Santa Barbara*, 144 Cal. 578, 588 [77 P. 1113].)

There was also involved the asserted right to the benefit of the full flow of the stream to maintain the underground and percolating water supply. The court concluded that no injunction against impounding of waters by the defendant should be issued, and "That if, as to any plaintiff, no substantial damages be proved, but a paramount or preferential right be shown, he is entitled to a judgment declaring such right and an injunction against the assertion of an adverse right based on user or lapse of time, or to compensation for the extinguishment of the paramount right, if such course be preferred; that if substantial damages result to the plaintiffs or any of them by reason of the continuance of the defendant's enterprise, taking into consideration the tests to be applied in the conservation and reasonable use of water now required by the law, such plaintiffs are entitled to the ascertainment of such damages and to an injunction in aid of securing timely payment thereof." 2 Cal. 2d at

383. Thus the holding was that damages should not be determined simply on the basis of the value of the plaintiffs' property before and after the defendant's impounding of water, but that the tests of reasonable use set forth in the amendment should be considered in determining such damages, and that they could not be awarded for the benefit from overflow and resulting silt, etc., because that would involve unreasonable use, or an unreasonable method of use, or an unreasonable method of diversion.

In the instant case, the court below held that respondents "had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." But the *Peabody* case held that such use of the full flood flow of the stream was unreasonable and that damages could not be awarded for unreasonable uses. The decision below is, therefore, in direct conflict with the *Peabody* case. The Court of Claims applied the rule of the *Herminghaus* case which the constitutional amendment was designed to abrogate. None of the decisions cited by the Court below (R. 140) limit the holding of the *Peabody* case. *City of Lodi* v. *East Bay Municipal Utility Dist.*, 7 Cal. 2d 316, and *Hillside Water Co.* v. *City of Los Angeles*, 10 Cal. 2d 677, both related to interference with use of underground water supplies which were in one case for the city's water system (the *Lodi* case) and in

the other as a supporting supply to surface irrigation (the *Hillside* case), uses and methods of use which in both instances were not held to be unreasonable. In the *Lodi* case a physical solution was directed whereby the city's supply could be protected without unreasonable use or unreasonable methods of use. In the *Hillside* case, no question of unreasonable use or unreasonable method of use was presented.

Nor was the *Peabody* case limited by the decisions in *City of Los Angeles* v. *Aitken,* 10 Cal. App. 2d 460, and *Los Angeles County Flood Control Dist.* v. *Abbot,* 24 Cal. App. 2d 728.[9] The *Aitken* case simply held that the use by the owners of property abutting on a lake as resorts because of its picturesque location and its availability for boating and hunting was a reasonable beneficial use. And the *Abbot* case reached a similar conclusion as to commercial use of sand and gravel deposited by the flow of the stream during the rainy season. No question arose as to whether an unreasonable method of use was involved.

The Court of Claims found (R. 88) "As the water flows over the lands of plaintiffs, some of it is absorbed, but the larger part flows on and eventually discharges into Suisan Bay and is not utilized for irrigation." "Grasslands in the vicinity and of the kind here involved can

[9] The *Peabody* case was likewise not limited by the three additional cases cited in the Brief in Opposition (p. 21).

utilize approximately 3 acre-feet per acre per year with maximum benefit.' This would on any theory constitute the limit of respondents' right to water. However, under the constitutional amendment they are entitled to water for beneficial use only if it can be applied by reasonable methods of use and reasonable methods of diversion. But there is no practicable means of using that quantity of water on the lands in the absence of controlled diversion, and controlled diversion is not feasible (Fdg. 31, R. 90). Since the water which could be beneficial cannot be used by reasonable methods of use, there is no right to the water.

III

RESPONDENTS GERLACH LIVE STOCK COMPANY, POTTER AND ERRECA WERE BARRED FROM RECOVERY BY THE RESERVATIONS IN THE DEEDS UNDER WHICH THEY HELD TITLE

These three respondents acquired their lands from Miller & Lux under deeds by which certain rights were reserved. The United States has succeeded to the rights reserved. While holding in one case not now before this Court (*Martin Erreca, et al. v. United States,* certiorari denied, No. 238, this Term) that the reservation in the deed prevented recovery (R. 135–137), the court below held that the reservations in the deeds of the three respondents mentioned above did not prevent their recovery (R. 134–135, 137–138). This we believe was error.

The deeds of Gerlach Live Stock Company and Martin Erreca contained the same provision. It was provided that the riparian rights of the land conveyed "shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee" (R. 137; Fdg. 59, R. 112, Fdg. 79, R. 126). The court below made no finding as to the cause of damage to respondents, but the opinion states that the reservation only included "storage" of water, did not embrace "diversion" and asserted that "What the United States has done that has caused the damage to plaintiffs' land is the *diversion* of the waters" (R. 138).

But other portions of the court's opinion,[10] as well as the findings, make it clear that it is the storage of water which will damage respondents. Since respondents' lands were benefited only by the peak of the spring floods (Fdg. 28, R. 87), it is the reduction of the height of those floods which prevents the inundation of most of respondents'

[10] In discussing the reservation in the deed in the case that was dismissed, it stated that prior to the reservation Miller & Lux had the right to divert water from the stream but did not have the right to store and impound it (R. 136). And with reference to the reservation in the J. Sheldon Potter deed discussed *infra*, it spoke of the "right to impound water at Friant Dam" (R. 135).

lands and increases the necessary pump lift of Martin Erreca's. As we have shown, Friant Dam will be operated for flood-control purposes and the dam is constructed with gates and valves permitting the release of water, referred to as "spills," so as to reserve vacant storage space for flood waters (Fdgs. 35, 41, R. 94, 98–99). The findings repeatedly refer to both the storage and diversion of water (Fdgs. 32, 35, R. 90, 94). It is clear that respondents' damage would be the same whether the waters from the peaks of the floods were diverted or simply stored and later released.[11] Since these respondents had no right to complain of storage of flood waters because of the reservations in their deeds, and since it was such storage that deprived them of the benefits they enjoyed, regardless of whether such flood waters were later released into the river or diverted elsewhere, the matter is *damnum absque injuria.*

The reservation in the deed of respondent J. Sheldon Potter was phrased somewhat differently. It provided (1) that the conveyance was subject (1) "to all existing water rights of the Grantor and its" subsidiaries, and (2) to the right of the grantor and its subsidiaries "to sell and convey any water right already established * * * in or to the waters of the San Joaquin River * * *

[11] The situation might possibly be different as to the Martin Erreca tract where water was pumped from the river (see Fdg. 62, R. 113). However, the court made no finding as to what the effect of reduction of the peaks of floods would be.

and to store and/or change the place of use of such water * * * and such right of storage of such water * * * may be exercised by any purchaser or assignee of said water rights" (Fdg. 51, R. 106–107). The court below reasoned that since this conveyance was subject only to existing water rights of Miller & Lux and since they did not have the right to store water at Friant Dam it did not affect respondents' right to recover (R. 134–135). But respondent Potter does not claim to have acquired any right to the waters of the river except by virtue of his acquisition of the land from Miller & Lux. In the first paragraph of the exception, the existing rights were reserved. The second paragraph obviously created an additional exception which was the right to store or change the place of use of the water. Since at the time of the conveyance, Miller & Lux had the right to use the water, the second exception precisely covered the storage of such water at Friant. Otherwise, the second paragraph is meaningless so far as storage of water is concerned.

IV

THE JUDGMENTS CANNOT BE SUSTAINED ON THE THEORY THAT CONGRESS HAS ASSUMED LIABILITY TO RESPONDENTS

In the brief in opposition (pp. 14–18), the respondents contended that Congress has directed the payment of compensation to respondents. The court below did not rest its decision upon any such

ground. Respondents may, of course, urge contentions not passed upon below which support the judgments. But we think it clear that Congress has not directed that compensation be paid.

A. RESPONDENTS WERE NOT GRANTED A RIGHT OF RECOVERY IN LEGISLATION RELATING TO THE CENTRAL VALLEY PROJECT

Respondents rely upon the fact that in the plan of the project described in the letter of the Secretary of the Interior the estimated cost thereof included an amount for "rights of way, water rights and general expense," and it was stated that "part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands" (R. 93; Br. in Op. 6). The Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, authorized the project in accordance with the plans set forth in Rivers and Harbors Com. Doc. No. 35, 73d Cong., which recommended a federal contribution of $12,000,000 to the cost of Kennett (Shasta) Dam. The Act of August 26, 1937, 50 Stat. 844, 850, provided that this $12,000,000 should, when appropriated, be available for expenditure by the Secretary of the Interior instead of the Secretary of War, and the entire Central Valley Project was authorized; it authorized the Secretary of the Interior to acquire by "eminent domain, or otherwise, all lands, rights-of-way, water rights and other property necessary for said purposes". (See p. 5, *supra*.) Various sums have been ap-

propriated annually for construction of the project, usually as a lump sum. For example, the Act of August 9, 1937, 50 Stat. 564, 597, contained the appropriation "Central Valley project, California, $12,500,000 together with the unexpended balance of the appropriation for this project contained in the First Deficiency Act, fiscal year 1936." The only reference to water rights in the various appropriation acts, which are set out in the Appendix, *infra,* pp. 89–96, is in the Act of July 12, 1943, 57 Stat. 451, 476, which included "examinations, surveys and water rights, $200,000."

Respondents' contention that Congress ordered payment for water rights rests upon these general statements of the Secretary of the Interior, the statutes empowering him to pay for water rights, the availability of funds for such purposes, and the fact that payments have been made to Miller & Lux, and others.[12] These all show that the Secretary of

[12] The reasons why the Government paid some riparian owners but not these respondents are indicated by the record. As to each of respondents Gerlach, Potter and Erreca, there was a question as to whether, under the reservations in the deeds whereby those respondents acquired their properties from Miller & Lux (see Point III, *supra,* p. 56), the sums applicable to their properties were payable to them or reserved to Miller & Lux (R. 133–134). Hence the agreement with Miller & Lux provided that this portion of the sum payable to the latter be placed in escrow, and used to reimburse the Government for any judgments which might be recovered by the three respondents. (R. 134.) As to the three Stevinson respondents, their petitions below aver that

the Interior *was authorized* to pay for water rights. But none of the statutes did more than authorize payment for water rights. In none did Congress assume liability beyond that imposed by the Constitutional requirements, and in none did Congress *direct* that persons having "rights" such as respondents be paid.

Respondents' argument ignores the distinction between an authorization to make payments and a congressional directive that they shall be made. In *Mitchell* v. *United States*, 267 U. S. 341, land was taken under authority of an Act which appropriated $7,000,000 for:

> increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and *losses to persons, firms, and corporations, resulting from the procurement of the land* for this purpose. [Italics supplied.]

This Court denied a claim for indirect damages suffered as a result of the loss of a business. The Court noted that by the above provision (267 U. S. at 345–346):

> Congress doubtless *authorized* the Secretary of War to take into consideration

they had been unable to reach an agreement with the Government as to the amount of compensation to be paid them. (R. 152, 156, 159.) In their petitions these respondents claimed $75,000, $9,000 and $780.00 respectively (R. 154, 157, 159); they were awarded $25,173, $1,665 and $234.00 (R. 192).

> losses due to the destruction of the business, where he purchased land upon agreement with the owners. [Italics supplied.]

But the Court held that:

> But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. * * * Congress had, of course, the power to make like provision here. Compare *United States* v. *Realty Co.*, 163 U. S. 427. But the mere reference in the appropriation clause to losses "resulting from the procurement of the land for this purpose" does not confer such a right.

Here, too, Congress may have authorized payment for water rights. But it did not assume any responsibility, or create any right not heretofore existing. As in the *Mitchell* case, respondents here must show "some statutory right conferred". But under the Acts relied upon by respondents, Congress did no more than simply authorize the Secretary to make payments. The *Mitchell* case establishes that in such circumstances there is no right to recover.

This would seem clearly correct. A general phrase in an appropriation act permitting payment for certain "rights" does not confer a right for which payment may be compelled. The au-

thorization empowered the governmental agency to contract to pay for water rights for which it would not otherwise have been liable and could not lawfully have paid. But it did not create any new rights enforceable at law against the Government.

There is ample reason for authorizing a governmental officer in his discretion to determine when it would be desirable in the public interest to make appropriate payments without creating a legal liability. It may be desirable in the interests of expediting the project and for the purpose of reconciling the various interests involved in such an undertaking that the governmental officer have authority to reach voluntary agreements settling claims asserted. It does not follow from the grant of such authority that Congress has waived the federal immunity and has undertaken a legal liability to pay such claims. It cannot be said that there is a clear assumption of liability. As this Court said in *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196: "A liability in any case is not to be imposed upon a government without clear words." See also *United States* v. *Zazove*, 334 U. S. 602, 617. Another aspect of the same principle is the fact that statutes waiving sovereign immunity are strictly construed and enlargement thereof by implication is not permissible, *United States* v. *Goltra*, 312 U. S. 203, 210–

211; *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 659.

Respondents' construction leads to the conclusion that, as to this particular project, Congress adopted a policy contrary to that prevailing with reference to any other river improvement project in the United States. When changes in policy are made, they are clearly and unmistakably expressed, as illustrated by the Act of December 22, 1944, 58 Stat. 887, discussed *infra*, p. 71. Certainly the statutes upon which respondents rely do not plainly support an assumption that Congress intended thereby to adopt such a radical departure from previous policy as that for which respondents contend.

But even if it be assumed that the acts relied upon constituted a direction to the Secretary to make compensation to respondents, the statutes do not show that Congress intended to assume an obligation enforceable in a suit against the United States in which the amount to be paid would be judicially determined. At most, even so construed, they empower the Secretary to exercise his discretion, for which judicial opinion cannot be substituted, as to payment and amount. The only remedy available if he wrongfully refuses to consider a claim would be by mandamus or its equivalent, not by an independent action for the amount claimed.

B. RESPONDENTS WERE NOT GRANTED A RIGHT OF RECOVERY UNDER THE RECLAMATION ACT

The 1937 Act (*supra*, p. 5) transferred the Central Valley project from the Secretary of War to the Secretary of the Interior. The third proviso then provided that the project would be covered by the reclamation law.[13] Respondents accordingly claim that the Reclamation Act of 1902 (32 Stat. 388) is applicable, and that sections 7 and 8 (43 U. S. C. 372, 383, 421) give them a right to recover.

Section 8 of the Act (43 U. S. C. 372, 383)[14] provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right

[13] "*Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes; * * *."

[14] Section 7 of the Act (43 U. S. C. 421) simply authorizes the acquisition by condemnation of "any rights or property."

> acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

This section did not constitute a grant of any rights. Instead it obviously was intended to avoid any possibility that the Reclamation Act would be construed as impliedly repealing the Desert Land Act, which made possible the acquisition of water rights in non-navigable streams under procedures established by state law. The second clause merely instructs the Secretary of the Interior to proceed in conformity with local law, and certainly such direction cannot constitute a grant of rights to anyone. The third clause, by providing that rights of the Federal Government in interstate streams shall not be affected, obviously cannot constitute a surrender of federal rights.[15] And the final clause, the proviso, establishes a federal rule regardless of state law relating to use of the water within a reclamation project after it has

[15] As to the reasons for the provision, see *Wyoming* v. *Colorado*, 259 U. S. 419, 463.

been established. Thus, there is nothing in any provision of the section which grants to individuals greater rights than they had prior to its enactment. And the House Reports (No. 794, 57th Cong., 1st sess., p. 6) specifically states that "Section 8 recognizes State control over waters of *non-navigable* streams such as are used in irrigation." [Italics supplied.]

Since, as we have shown *supra*, p. 39, private rights in the flow of navigable streams do not exist at least as against the United States, the first clause does not require their recognition by the Secretary. Since the waters of the river as well as the land were part of the public domain, the only way any water rights could be acquired and become vested under state law within the meaning of section 8 would be under the authority of the Acts of July 26, 1866, 14 Stat. 251, the Act of July 9, 1870, 16 Stat. 217, and the Desert Land Act of March 3, 1877, 19 Stat. 377. But in *California Oregon Power Co.* v. *Cement Co.*, 295 U. S. 142, it was repeatedly emphasized that the above statutes applied only to non-navigable waters. Since section 8 of the Reclamation Act requires the recognition of only those rights which are vested under state law and since no such rights could vest in navigable streams under state law, it follows that section 8 does not require the recognition of rights claimed by respondents.[16]

[16] Of course, the Secretary would be bound to recognize any rights which existed under federal law but, as we have shown *supra*, p. 39, the respondents have no such rights.

This construction is borne out by the administrative construction almost contemporaneous with the passage of the Act. An opinion of the Assistant Attorney General for the Interior Department, approved by the Secretary, was that the Act did not authorize claims to waters in navigable streams. He stated, *inter alia* (33 L. D. 391, 405; 1905):

> One element which the California Development Company undoubtedly considers of great importance in estimating the value of the property to be sold by it, is the claimed right to divert 10,000 cubic feet of water from the Colorado river. If the recognition of its claim as a valid right is involved in the approval of this transaction by the Secretary of the Interior, such approval should be withheld. *The Congress has control over navigable streams and the waters thereof. No claim based upon appropriation of such waters for irrigation made without the sanction of Congress should be recognized by this Department as valid.* Claims to the water of such a stream asserted under the law of a State must be adjudicated in some other forum. This Department not having jurisdiction to decree the validity of such a claim as that presented here should not do that which would necessarily involve the hypothesis of its validity. It seems that claims already made under state and territorial laws cover several times over all the waters of the river. If these claims can be sustained and enforced the navigation of the river would

> be utterly destroyed and all plans now under consideration by the reclamation service, which involve the use of water from this stream, would necessarily have to be abandoned. The Department of Justice is of opinion, as shown by the report of April 8, 1904, on H. R. 13627, that such claims cannot be sustained. [Italics supplied.]

See S. J. Res. 71, 33 Stat. 591; see also H. J. Res. 147, 58th Cong. 2d sess.; H. Rept. 2578, 58th Cong. 2d sess. Thus, almost contemporaneously with passage of the Reclamation Act, the administrative authorities recognized that, as the language of the Act shows, it was not intended to create property rights in the flowing waters of navigable streams nor to waive any rights of the Federal Government in that regard. So far as we have been able to ascertain, the question has not arisen in any administrative or judicial proceeding in the 40 years since that time. This in itself warrants the inference that the administrative interpretation of the Reclamation Act has been accepted.

As this Court has recognized, the Reclamation Act was enacted not in exercise of the federal power over navigable streams but as an exercise of the power to improve property of the United States, particularly the public domain. *United States* v. *Arizona*, 295 U. S. 174, 184. The title[17] and entire text of the 1902 Act show that it was

[17] "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories for the construction of irrigation works for the reclamation of arid lands." 32 Stat. 388.

concerned with the irrigation of arid public lands of the United States by the Department of the Interior. At that time projects on navigable waters normally were undertaken by the War Department. It is clear, both from the face of the Act and from its setting, that Congress was not dealing with water rights in navigable streams, but with non-navigable waters in the public domain. *Cf. United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, discussed *supra*, pp. 45–47. The rights which section 8 was designed to protect were thus not rights in the navigable waters of the United States.

C. THE FLOOD CONTROL ACT OF 1944

Respondents also refer (Br. in Opp. p. 15) to section 1 (b) of the Flood Control Act of December 22, 1944, 58 Stat. 887,[18] saying that Congress expressly provided therein that water rights of landowners in the western states based on consumptive uses should be considered superior to the right of the United States to make improvements in aid of navigation under the Flood Control Act. But the Act does not create such superior rights. It simply states a general policy to govern future

[18] "(b) The use for navigation, in connection with the operation and maintenance for such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

planning for projects in the western states. It says nothing as to the rights of riparian owners, and creates no new rights to compensation. In any view of the Act, it certainly does not purport to vest retroactively in respondents a property right which the court below held was taken three years earlier.

V

THE COURT OF CLAIMS FAILED TO DESCRIBE IN ITS FINDINGS THE PROPERTY TAKEN BY THE UNITED STATES

The opinion below referred to the rights of plaintiffs to the waters of the river (R. 132) and stated elsewhere that the erection of the dam "took these rights from plaintiffs" (R. 133). However, there is no finding which purports in any manner to describe what property was taken or what property interest would be acquired by the Government upon payment of judgments in favor of respondents. Respondents say that their petitions alleged their "riparian rights" and assert that the court found that that was what was taken (Br. in Opp. 20). The finding referred to (Fdg. 32, R. 90) is simply a description of the plan for the project. Neither in this finding nor in any other is there an explicit finding that respondents' "riparian rights" were taken.

More important, there is no attempt to define their riparian rights. The findings recognize that respondent's rights to use the water are inferior to other rights (e. g. Fdg. 12, R. 76). As

the findings state (Fdg. 30, R. 88) "The right of a riparian landowner to the use of water from a stream is not absolute, but must be correlated with similar rights of other riparian owners." In view of the nature of water rights, a finding that respondents' "water rights" were taken would not be nearly as definite as the "easement" in *United States* v. *Causby*, 328 U. S. 256, 267, which was held to be an insufficient description of the property taken. Certainly, the absence of the required finding cannot be supplied by judicial notice as respondents seem to suggest (Br. in Opp. p. 22).

Moreover, it is clear from the findings that all rights of respondents to use water of the San Joaquin River were not taken. All water will not be removed from the river, and upstream from respondents' lands there are tributaries which contribute water to the flow unaffected by Friant Dam (Fdg. 47, R. 102). While the finding is that the flow of the river would not flood respondents' lands (Fdg. 47, R. 102), the benefit from floods was not the only right claimed by them. They also claimed rights to use the water for domestic use and for watering livestock (Fdg. 28, R. 88). Obviously respondents have not been deprived of all rights to waters in the river. It is, therefore, important that the rights which have been taken and paid for in this proceeding be precisely described so as to avoid any dispute in the future.

VI

THERE WAS NO TAKING FROM RESPONDENTS ON OR PRIOR TO OCTOBER 20, 1941, SUCH AS TO ENTITLE RESPONDENTS TO INTEREST FROM THAT DATE

Respondents contended and the court below held that respondents' properties were taken on October 20, 1941. The court awarded interest from that date which amounts to some $27,000 at the present time (R. 129, 191). It is submitted that, assuming that there will be a taking of property of respondents as a result of operation of the Friant Dam, the court erred in holding that such taking had occurred by October 20, 1941, so that as to entitle respondents to interest from that date.[19]

There is no dispute concerning the facts as to this matter. Construction of the dam was commenced in 1939, and up to March 1941 the water of the river was carried around the dam site in a flume slightly above the normal low-water surface of the river (Fdg. 42, R. 99).

As the work progressed the flow was diverted through temporary openings which were some 10 feet above the normal low-water surface of the river (elevation 305.6 feet (R. 99)). In 1941 the temporary openings were closed, the last one about October 20, 1941, and water was impounded to elevation 375.42 feet when it commenced to spill through permanent river outlets

[19] Under a theory of statutory assumption of liability interest would not be allowable. *United States* v. *Hotel Co.*, 329 U. S. 585.

(Fdgs. 43, 44, R. 100). These outlets were designed to be controlled by needle valves, but the valves were not installed and used for impounding water until February 1944 (Fdg. 45, R. 101). The Madera Canal, through which part of the water will be diverted, was completed in 1944 (Fdg. 46, R. 101), and the Friant-Kern Canal, the other diversion canal, was not completed at the time of trial in 1946 (Fdg. 46, R. 102). Also drum gates had not then been installed "and for that reason the reservoir has not yet filled to its designed capacity" (Fdg. 46, R. 102). In each case, the court found that had the impounding between October 21 and November 11, 1941, not occurred, "the flow still would not have been sufficient to flood the" respondents' lands, and that "Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941" (Fdgs. 56, 75, 85, R. 110, 124, 127; St. Fdgs. 41, 45, 48, R. 188, 189, 190).

Thus, as the opinion below recognized (R. 141), at the time of trial respondents were "still getting all the water they ever got because defendant's project has not yet advanced to the stage where their water has been cut off." Moreover, as the findings show, it was physically impossible in October 1941 and for many years thereafter to deprive respondents of any rights.

The prospect that respondents will be deprived of water sometime in the future cannot constitute such a taking of their rights as to entitle them

to interest. Such was the view of this Court in *Danforth* v. *United States*, 308 U. S. 271. The petitioner's land there was located in a proposed floodway located between a river-bank levee and a set-back levee. The floodway would be used through means of a fuse-plug, which is a portion of the river-bank levee lowered some five feet so as to feed floodwaters in the floodway. This Court held that there was no taking either by enactment of the legislation authorizing the project or by commencement or completion of the set-back levee, and hence that no interest was payable. The opinion stated (p. 286):

> The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction. The river bank levee at the fuse-plug has not been lowered from is previous height. Consequently the land is as well protected from destructive floods as formerly.

The instant case presents the converse physical situation, but the principle is the same. Respondents' lands have not been deprived of any of the benefits of floods which they formerly enjoyed. Respondents argue (Br. in Opp. pp. 19–20) that compensation should depend upon the use which the condemnor was entitled to make rather than the actual use. But that argument (regardless of

its validity—see *Karlson* v. *United States*, 82 F. 2d 330 (C. A. 8)), ignores the physical fact that it was impossible to deprive respondents' lands of floodwaters in October 1941 because valves were not installed and were not available.

The court below did not refer to the *Danforth* case, which deals with the problem of interest in circumstances very similar to those at bar, but cited other decisions (R. 142–144) which clearly do not support its conclusion. In *United States* v. *Sponenbarger*, 308 U. S. 256, this Court held that adoption by Congress of the Mississippi Flood Control Act of 1928 was not a taking. The opinion in the *Danforth* case, decided the same day, shows that the *Sponenbarger* decision did not, as the court below seemed to think (R. 143–144), rest on the fact that the plan contemplated in the *Sponenbarger* case was later abandoned. These decisions likewise demonstrate that *Hurley* v. *Kincaid*, 285 U. S. 95, did not hold that adoption of a plan by Congress was a taking as soon as the Government begins to carry out the project. Rather, that decision was simply that, even if it were assumed that there was a taking, there was an adequate remedy at law and hence equitable relief should not be granted.

Nor do the decisions in *Peabody* v. *United States*, 231 U. S. 530, *Portsmouth Co.* v. *United States*, 250 U. S. 1, and *Portsmouth Co.* v. *United States*, 260 U. S. 327, support the decision below. In the first two cases it was held that no taking

had occurred. In the third case it was held that a taking had been sufficiently alleged, the petition stating that guns had been set up with the intention of firing them over the claimants' land. Thus, there was physical ability to perform the harmful act coupled with intent to do so. It has never heretofore been held that a taking had occurred prior to the time the project was sufficiently completed so as to be able to execute the plan.

In *United States* v. *Dickinson*, 331 U. S. 745, the question of when a taking had occurred so as to permit the institution of a suit was not decided (p. 749). This Court's emphasis on practical fairness in relation to the particular situation there presented—when the statute of limitations should begin to run—suggests a similar approach to the question of interest, which would bar the running of interest before any of a property owner's rights were actually invaded.[20]

The court below reasoned (R. 145) that by October 1941 the United States had brought about a decrease in the value of plaintiffs' lands because "With the imminent prospect of their being deprived of any

[20] Although the Government argued in the *Dickinson* case that the taking occurred when the dam began to impound water, in that case there was no physical impediment rendering the "taking" of the riparian owner's rights impossible until some indefinite future time, such as there is here. The reasoning of this Court's opinion, which did not accept the Government's theory, suggests that the critical date or dates for purposes of the statute of limitations may well be different from the date for the running of interest.

further rights to the flood waters of this river, they could not have sold them for their former value." But in the physical situation existing at that time, and particularly since the Friant-Kern Canal had not even been commenced (Fdg. 45, R. 101), it was obvious that the owners of such lands would enjoy the benefits of the flood waters for a considerable period after that date, and they did in fact receive those benefits up to the time of trial. The "interest" which is awarded as a part of just compensation under the Fifth Amendment represents an amount sufficient to produce the full equivalent of market value paid contemporaneously with the taking. *United States* v. *Klamath Indians,* 304 U. S. 119, 123. But, as stated in *Bauman* v. *Ross,* 167 U. S. 548, 574:

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Respondents were not deprived of use of the flood waters in October 1941. At that time they could have, at most, simply anticipated that they would lose their rights to such waters when the gates and valves were installed and the diversion canals completed. The result of the decision below is that for several years after 1941 respond-

ents continued to enjoy the benefits of the flood waters, and yet for all of those years the United States is required to pay interest as if respondents did not have them. Such a result is, we submit, "unjust to the public." Respondents have been compensated, not because of any interference actually experienced with their property rights, but merely because the project had been undertaken and partially completed. As this Court stated in the *Danforth* case, *supra* (308 U. S. at p. 285):

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

CONCLUSION

For the foregoing reasons the judgments of the court below should be reversed with directions to dismiss the petitions.

Respectfully submitted.

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FEBRUARY 1949.

APPENDIX

The Reclamation Act of June 17, 1902, 32 Stat. 388, provides:

> SEC. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.
>
> SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water, in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurte-

nant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

* * * * *

The Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, provided:

That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; and that hereafter Federal investigations and improvements of rivers, harbors, and other waterways shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and the supervision of the Chief of Engineers, except as otherwise specifically provided by Act of Congress:

* * * * *

Sacramento River, California; Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress;

* * * * *

The Act of July 30, 1941, 55 Stat. 612, provides:

That, in aid of the construction of the Central Valley project, authorized by the Acts of April 8, 1935 (49 Stat. 115), and August 26, 1937 (50 Stat. 850), there is hereby granted to the United States, subject to the provisions of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and allotted lands within the area embraced by the Central Valley project, in-

cluding sites of agency and school buildings and related structures, as may be designated therefor by the Secretary of the Interior from time to time, and (b) such other interests in or to any of such lands and property as may be required and as may be designated by the Secretary of the Interior from time to time for the construction of reservoirs, canals, ditches, pipe lines, highways, railroads, telegraph, telephone, and electric-transmission lines in connection with the project, or for the relocation or reconstruction of such facilities made necessary by the construction of the project.

SEC. 2. As lands or interests in lands are designated from time to time under this Act, the Secretary of the Interior shall determine the amount of money to be paid to the Indians as just and equitable compensation therefor. As to the tribal lands, the amounts so determined shall be transferred in the Treasury of the United States from the funds now or hereafter made available for the construction of the Central Valley project to the credit of the appropriate tribe pursuant to the provisions of the Act of May 17, 1926 (44 Stat. 560). The amounts due individual landowners or their heirs or devisees shall be paid from funds now or hereafter made available for the construction of said project to the superintendent of the appropriate Indian Agency or such other officer as shall be designated by the Secretary of the Interior for credit on the books of such agency to the accounts of the individuals concerned.

SEC. 3. Funds deposited to the credit of allottees, their heirs, or devisees may be used, in the discretion of the Secretary of

the Interior, for the acquisition of other lands and improvements, or the relocation of existing improvements or construction of new improvements on the lands so acquired for the allottees or heirs whose lands and improvements are acquired under the provisions of this Act. Lands so acquired shall be held in the same status as those from which the funds were derived, and shall be nontaxable until otherwise provided by Congress.

SEC. 4. As to any Indian cemetery lands required for the project, the Secretary of the Interior is authorized, in his discretion, in lieu of requiring payment therefor, to establish cemeteries on other lands that he may select and acquire for the purpose, and to remove bodies, markers, and other appurtenances to the new sites. All costs incurred in connection with any such relocation shall be paid from moneys appropriated for the project. All right, title, and interest of the Indians in the lands within any cemetery so relocated shall terminate and the grant of title under this Act take effect as of the date the Secretary of the Interior authorizes the relocation. Sites of the relocated cemeteries shall be held in trust by the United States for the appropriate tribe, or family, as the case may be, and shall be nontaxable.

SEC. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to prescribe such regulations as he may deem appropriate to carry out the provisions of this Act.

* * * * * *

The Act of December 22, 1944, 58 Stat. 887, provides:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If

such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of

his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same

provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

* * * * *

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be *utilized for irrigation purposes*, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be

predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided,* That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

* * * * *

The Act of June 22, 1936, 49 Stat. 1597, 1622, appropriated funds for:

Central Valley Project; California: For continuation, $6,900,000, to remain available until June 30, 1937, of which $6,000,000 shall be available for construction of Friant Reservoir and irrigation facilities therefrom in the San Joaquin Basin and $250,000 for administrative expenses (including personal services in the District of Columbia and elsewhere), to be available for the same purposes as those specified for projects included in the Interior Department Appropriation Act for the fiscal year 1937 under the caption "Bureau of Reclamation" and to be reimbursable under the Reclamation Law; *Provided,* That not to exceed $25,000 may be expanded for personal services in the District of Columbia.

* * * * *

The Act of May 9, 1938, 52 Stat. 291, 324, appropriated funds for:

Central Valley project, California, $9,000,000, together with the unexpended balance of the appropriation for this project contained in the Interior Department Appropriation Act, fiscal year 1938, with authority in connection with the construction of the Central Valley project, California, (1) to purchase or condemn and to improve suitable land for relocation of highways, roadways, railroads, telegraph, telephone, or electric transmission lines or other properties the relocation of which, in the judgment of the Secretary of the Interior, will be necessitated by construction or operation and maintenance of said project, (2) in full or part payment for said properties to be relocated, to enter into contracts with the owners of said properties to be relocated whereby they undertake in whole or in part the property acquisition and work involved in relocation and, in said Secretary's discretion, to pay in advance for said work undertaken by said owners; and (3) to convey or exchange acquired rights-of-way or other lands or rights-of-way owned or held by the United States for use in connection with said project, or to grant perpetual easements therein or thereover, or to undertake improvement or construction work connected with said relocations, for the purpose of effecting completely said relocations;

* * * * * *

The Act of May 10, 1939, 53 Stat. 685, 718–719, propriated funds

For continuation of construction of the following projects and for general investigations in not to exceed the following amounts, respectively, to be expended from the general fund of the Treasury in the

same manner and for the same objects of expenditures as specified for projects included hereinbefore in this Act under the caption "Bureau of Reclamation", to be immediately available, to remain available until expended, and to be reimbursable (except as to the Pine River project, Colorado, and the Colorado River project, Texas) under the reclamation law:

Central Valley project, California, $10,000,000: *Provided,* That this appropriation and the unexpended balances of appropriations heretofore made for the construction of this project shall be available until expended and shall be accounted for as one fund, entitled "Central Valley project, California";

* * * * *

Appropriations in substantially the same terms are made for the Central Valley project in the Acts of April 6, 1940, 54 Stat. 82, 87; Act of June 18, 1940, 54 Stat. 406, 438; Act of June 28, 1941, 55 Stat. 303, 336; Act of July 2, 1942, 56 Stat. 506, 536.

In the Act of July 12, 1943, 57 Stat. 451, 476, appropriation was made

> For continuation of construction of the following projects and for general investigations and administrative expenses in not to exceed the following amounts, respectively, to be expended from the general fund of the Treasury in the same manner and for the same objects of expenditures as specified for projects included hereinbefore in this Act under the caption "Bureau of Reclamation" under the heading "Administrative provisions and limitations", but without regard to the amounts

of the limitations therein set forth, to be immediately available, to remain available until expended, and to be reimbursable under the reclamation law:

* * * * *

Central Valley project, California, Shasta Dam, Reservoir, and power plant, $10,900,000; Keswick Dam and power plant, $1,474,000; Friant Dam and Reservoir, $595,000; transmission line to Shasta substation, $400,000; Friant-Kern Canal, $7,000,000; Madera Canal, $1,000,000; Contra Costa Canal, $500,000; Contra Costa laterals, $500,000; and examinations, surveys, and water rights, $200,000; in all, $22,569,000;

* * * * *

The Act of June 28, 1944, 58 Stat. 463, 490, ppropriated funds

For continuation of construction of the following projects and for general investigations and administrative expenses in not to exceed the following amounts, respectively, to be expended from the general fund of the Treasury in the same manner and for the same objects of expenditures as specified for projects included hereinbefore in this Act under the caption "Bureau of Reclamation" under the heading "Administrative provisions and limitations", but without regard to the amounts of the limitations therein set forth, to be immediately available, to remain available until expended, and to be reimbursable under the reclamation law:

* * * * *

Central Valley project, California, $960,200, and in addition thereto the unexpended

balance heretofore determined to be available for construction of transmission lines shall be allocated to other construction features of the project;

* * * * * *

The Act of July 3, 1945, 59 Stat. 318, 342, appropriated funds

For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law:

* * * * * *

Central Valley project, California, $4,500,000;

* * * * * *

The Act of December 28, 1945, 59 Stat. 632, 647–648, appropriated funds for

Construction: For additional amounts for construction of the following projects, including the objects specified under the head "Bureau of Reclamation" in the Interior Department Appropriation Act, 1946, to be expended from the general fund of the Treasury, to remain available until expended and to be reimbursable under the reclamation law:

* * * * * *

Central Valley project, California: Storage system, Shasta Dam and Reservoir, relocation of secondary roads, $100,000; road between Shasta and Keswick Dams and United Sates Highway 99, $150,000; clearing Shasta Reservoir area, $100,000; Shasta Dam, $500,000; Delta division,

Delta-Mendota canal, $7,500,000; Delta Cross channel, $349,420; Friant division, Friant Dam and Reservoir, $200,000; Friant-Kern canal, $6,000,000; Power system, Shasta power plant, $885,580; Keswick Dam, $500,000; Keswick power plant, $550,000; switchyards, $1,600,000; transmission lines, Oroville to Sacramento, two hundred and thirty kilovolt, $730,000, and Sacramento between substations, two hundred and thirty kilovolt, $50,000; in all, $19,215,000;

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The Act of July 1, 1946, 60 Stat. 348, 367, appropriated funds

For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law:

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Central Valley project, California: Joint facilities, including storage system, Shasta Dam and Reservoir, $1,385,365; irrigation facilities, $6,284,020; power facilities, Shasta power plant, $1,435,097, Keswick Dam, $510,570, Keswick power plant, $510,570, switchyards at Shasta and Keswick Dams, $1,500,000, transmission lines, Shasta to Oroville, two hundred and thirty kilovolt, $10,000, Oroville to Sacramento, two hundred and thirty kilovolt, $1,000,000, Contra Costa Canal extension, sixty-nine kilovolt, $50,000; in all, $12,685,622;

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The Act of July 25, 1947, 61 Stat. 460, 475, appropriated funds

> For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law, except as provided in the Act of August 14, 1946 (Public Law 732), Seventy-ninth Congress:
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> Central Valley project, California: Joint facilities, $690,000; irrigation facilities, $5,622,028; power facilities, Shasta power plant, $427,800, Keswick Dam, $100,740, Keswick power plant, $218,040; transmission lines, Shasta to Delta, via Oroville and Sacramento, two hundred and thirty kilovolt, $256,680, Shasta Dam to Shasta substation, two hundred and thirty kilovolt, $1,500,000, Keswick tap line, two hundred and thirty kilovolt, $160,000, Contra Costa Canal extension, sixty-nine kilovolt, $118,000; substation, Contra Costa, $48,000; in all, $9,141,288;
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The Act of December 23, 1947, 61 Stat. 941, 944, appropriated funds for

> Construction: For additional amounts for continuation of construction of the following projects, to remain available until expended, and to be subject to such limitations and restrictions as may be applicable to appropriations for such purposes in the

Interior Department Appropriation Act, 1948, or other law, as follows:

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Central Valley project, California: Joint facilities, $1,273,600; irrigation facilities, $8,771,600; power facilities, Shasta power plant, $700,000; Keswick Dam, $145,000; Keswick power plant, $514,800; in all, $11,405,000.

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